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No. 86-1622

In The

Supreme Court of the United States

October Term, 1986

UNITED STATES OF AMERICA,

Petitioner,

vs.

CARL A. FUCCILLO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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COUNTERSTATEMENT

The Respondent, Carl A. Fuccillo, submits the following Counterstatement to add relevant facts omitted from the Petitioner's Statement and to correct certain inaccuracies.

On September 27, 1984, United States Magistrate Robert J. DeGiacomo issued three search warrants, one for each of the following premises owned by the Respondent: (1) Fashion Apparel Distributors ("FAD"), a wholesale distributor of women's clothing located in Revere, Massachusetts; (2) a warehouse containing primarily women's clothing located in Milford, Massachusetts; and (3) Fashions On Tremont ("FOT"), a retail women's clothing store in Boston. C.A. App. 1-18.

In issuing all three warrants, the Magistrate relied exclusively on a single three and one-half page affidavit, without attachments, which was submitted by Federal Bureau of Investigation ("FBI") Special Agent Lawrence Frisoli. C.A. App. 3-6, 9-12, 15-18. According to the affidavit, two trailers containing eight hundred and thirty-nine cartons of women's clothing were stolen during August of 1984 from Women's Specialty Retailing in Enfield, Connecticut. Many of the stolen cartons were originally destined for delivery to Casual Corner stores. Delivery slips were attached to the cartons identifying particular store numbers, store names and store addresses. C.A. App. 3, 9, 15; App. 3a-4a; 15a.

The affidavit included uncorroborated information from an unidentified informant, who had advised Agent Frisoli that "stolen women's clothing" was located at

the Revere, Milford and Boston locations. Also, two FBI agents had "observed several racks of hanging women's clothing" inside the Milford warehouse. C.A. App. 3, 5, 9, 12, 15, 18.

Agent Frisoli stated in his affidavit that on September 26, 1984, Ms. Anne Sweeney, a Casual Corner store manager, visited Fashions On Tremont ("FOT") in Boston accompanied by an FBI Agent. Ms. Sweeney observed the following articles of clothing for sale at FOT, articles which were manufactured exclusively for sale at Casual Corner stores: eight Newsport skirts, twelve Jenniffer blouses, and twelve Organically Grown sweaters. Ms. Sweeney also observed one hundred Jennifer Reed cotton knit vests and two down angora vests which she identified as having been made exclusively for Casual Corner, even though the labels had been removed. C.A. App. 4, 10, 16; App. 4a, 19a. At no time did Ms. Sweeney observe any "cartons of women's clothing," the words used in each of the three search warrants to describe the items to be seized. App. 3a, 15a, 20a.

None of the three search warrants issued by the Magistrate included any lists or descriptions of the specific items of clothing observed by Ms. Sweeney, nor any lists of the store numbers, names and addresses shown on the stolen cartons' delivery slips.

On September 28, 1984, three separate teams of FBI agents executed the search warrants in Revere, Milford and Boston. The executing agents brought Casual Corner managers to all three locations to help the agents look for Casual Corner property and "to identify clothing belonging to their company that should not be for sale outside

. . . Women's Specialty Retailing." Petition ("Pet".) 4; C.A. App. 72-76.

From FOT in Boston, the agents seized two hundred sweaters, three jackets, seventy-two blouses, sixty-four pairs of pants, five shirts, a blank Mastercard slip and an FAD invoice. C.A. Supp. App. 1. The executing agents first removed the clothing from hanging racks at FOT and then placed the clothing into seven bags, which the agents seized. No cartons of clothing were taken. App. 5a; C.A. App. 66.

From FAD in Revere, the agents seized twenty-nine cartons "of assorted women's clothing," one hundred and eleven Sasson dresses, one hundred and thirty *men's* corduroy sport jackets and four empty boxes. The return of the warrant signed by Agent Frisoli contains no reference whatsoever to Casual Corner clothing or boxes. App. 5a, 11a, 22a; C.A. Supp. App. 2.

Prior to executing the search warrant at the warehouse in Milford, Special Agent Arthur W. Ryall spoke with Respondent Fuccillo, who had met the agents when they arrived. The following is quoted directly from Special Agent Ryall's official report of the search:

> SA RYALL explained to FUCCILLO that there were some items located in the warehouse that had mailing labels to "FAD, 5 Fayette Street, Milford, Massachusetts," and if these items were legitimate FUCCILLO should inform the FBI. FUCCILLO did not respond and SA RYALL then told him the entire contents of the warehouse were going to be taken. FUCCILLO responded, "You're going to take everything?"

C.A. Supp. App. 3. The agents did take "everything," and seized the *entire contents* of the Milford warehouse. App. 5a, 11a, 22a; C.A. App. 92.

Moreover, although the executing agents removed five hundred and eighty-four "cartons of women's clothing" from the Milford warehouse, this clothing had been hanging on racks when the agents arrived. The agents took the clothing off the racks, placed the clothing in cartons, and then seized the cartons. C.A. Brief For Appellant 5. The items seized from the Milford warehouse included women's pullovers, Sasson skirts, and some Casual Corner clothing. The agents also seized a number of bins of clothing, racks holding one hundred and fifty *men's* corduroy sport jackets, empty cardboard cartons, and papers and receipts. App. 5a, 22a; C.A. App. 91-92; C.A. Supp. App. 10-23.

On October 12, 1984, two weeks after the searches, thirty-five to forty percent (*i.e.*, one hundred and ninety-three boxes) of the clothing seized by federal agents from the Milford warehouse had to be returned to the Respondent. C.A. App. 83, 87, 92-93; C.A. Supp. App. 24.

REASONS FOR DENYING THE PETITION

I. The Court Below Properly Applied the Standards In United States v. Leon Consistent With The Decisions Of Other Circuit Courts.

Review by the Court on writ of certiorari is not a matter of right, but of judicial discretion, "and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. The Petitioner has asked the Court to review the decision in this matter rendered by the First Circuit Court of Appeals "to resolve the substan-

tial differences between the circuits in the application of [*U.S. v.*] *Leon* to warrants that are found to be insufficiently particularized." Pet. 8. See Sup. Ct. R. 17.1(a). However, a comparison of the decisions cited by the Petitioner from other circuits confirms that the First Circuit in this case applied the standards set forth in *U.S. v. Leon* in accordance with the other circuits that have considered the so-called "good faith exception" to the exclusionary rule announced by the Court in *Leon*. Therefore, the government's Petition for Certiorari should be denied.

The First Circuit found that the warrants authorizing the three searches conducted by FBI agents at the Respondent's premises "were constitutionally impermissible in their failure to satisfy the particularity requirements of the Fourth Amendment." App. 12a. The FBI agents in this case did not take "every step that could reasonably be expected of them" to obtain constitutionally sufficient warrants. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). In regard to the Milford and FAD warrants which authorized the search of two clothing warehouses, the First Circuit found that the FBI apparently made "no effort" to obtain or to include in the warrants the information contained upon the delivery slips attached to the stolen cartons of clothing, "identifying the store that was receiving the goods, including the store number, name and address." App. 9a. The Court noted that the warrants, directing the agents to seize "cartons of women's clothing," instead could easily have directed the agents to "cartons of women's clothing from Casual Corner Stores" or "cartons from Women's Specialty Retailing". App. 9a.

In regard to the search of FOT in Boston, the First Circuit stated that "[i]t is beyond cavil that the warrant

for the search of FOT could have been written with precision to assure that appellee's personal rights would remain inviolate," by including the "very detailed list of articles" identified for the FBI by Ms. Sweeney. App. 9a-10a. The First Circuit found the FOT warrant to be "glaringly deficient" in not "identifying these articles of clothing with specificity, thus limiting the scope of the seizure. . . ." App. 10a.

The Petitioner has alleged that the First Circuit misread the decision of this Court in *United States v. Leon* and "effectively held the agents to a standard of near perfection in the drafting of warrants." Pet. 8. The Petitioner argues that "it is difficult to imagine how the warrants could have been drafted more narrowly without imposing inappropriate limitations on the items to be seized," adding that the First Circuit's suggestions for improving the warrants were "plainly flawed," because the suggested limitations "might well have omitted much, if not all, of the stolen property that the agents clearly had probable cause to seize." Pet. 10-11. How the addition of a list of identified items or the words "Casual Corner clothing" to the warrant would have caused "much, if not all of the stolen property" to be omitted from the scope of the warrant is difficult to fathom.

Moreover, the Petitioner cites with approval the Second Circuit case of *United States v. Buck*, No. 86-1500, slip. op. at 1810 (2d Cir. Mar. 10, 1987), where the court ruled that "the use of a catch-all description in a search warrant, unaccompanied by any list of particular items or any other limiting language" was constitutionally deficient. The *Buck* court noted that the search in that case

was conducted in 1981, years before the July, 1984 decision in *United States v. Leon,* and prior to the time when the jurisdiction in which the officers were operating first spelled out the particularity requirement for warrants. As such, the Second Circuit found that a reasonably well-trained officer could not have been expected to know in 1981 that the general search warrant issued by the judge in that case violated the particularity requirements of the Fourth Amendment. *Id.*

The *Buck* decision is wholly consistent with the decision rendered by the First Circuit in the instant case. The search warrant in the present case was issued in September of 1984, several months after the decisions in *U.S. v. Leon* and *Massachusetts v. Sheppard.* Further, the federal agents in this instance had available to them established rules for drafting so-called "generic" warrants, which were set forth in three First Circuit cases dating from 1977, 1978 and 1979.[1] See Pet. 13, n. 6.

The other Second Circuit decision cited by the Petitioner, *United States v. Scharfman,* 448 F.2d 1352 (2d Cir. 1972), is also consistent with the First Circuit decision. *Scharfman* involved the hijacking of a shipment of hundreds of furs. The informant in *Scharfman* was an experienced furrier who alerted the FBI that furs from the hijacked shipment were located at the defendant's premises. Also, an employee of the owner of the furs positively identified a fur coat in the defendant's store as being part of the hijacked load.

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[1] *United States v. Cortellesso,* 601 F.2d 28 (1st Cir. 1979), *cert. denied,* 444 U.S. 1072 (1980); *Montilla Records of Puerto Rico, Inc. v. Morales,* 575 F.2d 324 (1st Cir. 1978); *United States v Klein,* 565 F.2d 183 (1st Cir. 1977).

In contrast, the informant relied upon by the FBI in the instant case was not an expert in the field of women's clothing. In fact, Agent Frisoli's affidavit contains not one word concerning the informant's background, reliability or the basis of his or her alleged knowledge that clothing stolen from Casual Corner was located at the Respondent's premises. Nor did Ms. Sweeney, the Casual Corner manager who identified the specific articles of clothing at FOT, recognize any of the items as having been part of the clothing stolen from Women's Specialty Retailing. Therefore, unlike *Scharfman,* "there was no evidence presented to the magistrate to support the conclusion that stolen goods constituted a dominant or even a significant part of the inventory on the premises . . . ." *United States v. Cortellesso,* 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied,* 444 U.S. 1072 (1980).

The Eleventh Circuit decision cited by the Petitioner, *United States v. Accardo,* 749 F.2d 1477 (11th Cir. 1985), *cert. denied,* No. 85-518 (Nov. 4, 1985), also conforms with the First Circuit standards. The search warrant in *Accardo* authorized the seizure of "all corporate records." *Id.* at 1481. The crime alleged in *Accardo* was a type of complex financial fraud, sometimes referred to as a "paper puzzle," which has been held to justify a more flexible reading of the Fourth Amendment particularity requirement. *Id.*, and cases cited. In contrast, the executing agents in this case were searching for stolen Casual Corner clothing, which does not require specialized expertise or knowledge to identify.

Further, the Eleventh Circuit found that the warrant "was not seriously challenged by any of the defendants."

Id. at 1480. The Respondent in this case challenged the use of the Milford warehouse search warrant at the time of its execution, asking one of the executing agents, "You're going to take everything?," which is precisely what the agents did.

II. The Flagrant And Deliberate Misconduct Of The Agents In Executing The Warrants Cannot Constitute Good Faith.

The circuit court in *Accardo* remanded that case to the district court for an evidentiary hearing to consider the issue of the executing officers' good faith. *Id.* at 1481. The *Accardo* court cited *Leon* for the proposition that in determining whether a police officer acted in good faith, "all of the circumstances . . . may be considered," adding that evidence needed to be elicited "touching upon the conduct of the officers." *Id.*, citing *Leon*, 468 U.S. 897, 922, n.23. This statement in *Accardo* raises the second proposed basis for review argued by the Petitioner, whether the First Circuit court misread *Leon* "when it concluded that agents cannot be acting in good faith when some of the items they seize are outside the four corners of the warrant." Pet. at 8. The Petitioner mistakenly concludes that "*Leon* itself imposes no such limitation." *Id.*

The Court in *Leon* held that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges or magistrates."[2] *Leon*, 468 U.S. at

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[2] The Petitioner clearly misconstrues this standard by arguing that "suppression is appropriate only when *the magistrate* or agent *has wholly abdicated his professional responsibilities.*" App. 9a. (emphasis added).

916. The Court noted that the discussion in *Leon* of the deterrent effect of excluding evidence obtained in reasonable reliance on a subsequently invalidated warrant "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Leon*, 468 U.S. at 918, n.19. In addition, the Court stated that in weighing the deterrent effect of exclusion, "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus." *Id.* at 911. The Court has not seriously questioned the continued application of the exclusionary rule where a Fourth Amendment violation has been "substantial and deliberate." *Id.* at 908-909, and cases cited.

Applying these principles to the facts of this case, it is unarguable that the First Circuit did not misread *Leon*, but rather properly found that the FBI agents did not act in objective good faith in reasonable reliance upon "facially valid" warrants. It is the government, not the defendant, that bears the burden of proving that its agents' reliance upon the warrants was reasonable. *United States v. Michaelian*, 803 F.2d 1042, 1048 (9th Cir. 1986), cited at Pet. 16-17.

The facts clearly indicate that the executing agents knew that the three warrants were so facially deficient in failing to particularize the articles to be seized that the agents could not reasonably presume them to be valid. App. 12a; *Leon*, 468 U.S. at 923. First, the executing agents brought with them to each of the locations to be searched a Casual Corner manager to help the agents look for Casual Corner property and "to identify clothing belonging to their company that should not [have been] for

sale outside . . . Women's Specialty Retailing." Pet. 4; C.A. App. 72-76. If the agents had believed the warrants to be sufficiently particularized to allow them to distinguish the stolen Casual Corner goods from the other clothing at the Respondent's premises, they would not have required the Casual Corner managers to help them identify the stolen goods.

Second, to be constitutionally sufficient, search warrants must leave nothing to the discretion of the officers executing the warrant. App. 6a, 16a and cases cited. The search warrants authorized the executing agents to seize "cartons of women's clothing." The facts show that the executing officers improperly exercised discretion in searching at all three locations.

At FOT in Boston the agents exercised discretion by removing clothing from racks at the store and placing the clothing in bags, which they then seized. App. 5a; C.A. App. 66.

At FAD in Revere, the executing agents exercised their discretion by seizing some "cartons of assorted women's clothing," but also by seizing racks of women's dresses, racks of men's corduroy sports jackets, and empty boxes. App. 5a, 11a, 22a; C.A. Supp. App. 2.

The most flagrant, substantial and deliberate misuse of "discretion" occurred at Milford, where the executing agents intentionally seized the entire contents of the Milford warehouse after the Respondent refused to reply to Agent Ryall's questions asking which items were "legitimate." If the Milford search warrant had been sufficiently particularized, such questioning would not have been necessary. Moreover, the trained FBI agents knew

or should have known that to take everything from the warehouse, including racks of men's clothing, far exceeded the authorized scope of the search. App. 5a; 22a; C.A. App. 91-92; C.A. App. 10-23. As proof of their knowledge that they were exceeding the scope of the warrant, the agents intentionally removed clothing at the Milford warehouse from hanging racks and placed the clothing into cartons before seizing it, in a transparent attempt to comply with the dictates of the warrant. C.A. Brief for Appellant 5.

Finally, the scope of the Milford search warrant was so excessive that the agents were later required to return to the Respondent thirty-five to forty percent of the items the agents had seized. C.A. App. 83, 87, 92-93, C.A. Supp. App. 24.

The Court has repeatedly held that "because the purpose of the exclusionary rule is to deter police officers from violating the Fourth Amendment, evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Illinois v. Krull*, No. 85-608 (Mar. 9, 1987), citing *United States v. Peltier*, 422 U.S. 531, 542 (1975). Because the facts here show that the FBI agents did have knowledge that the searches were unconstitutional, the First Circuit properly applied the standards of objective "good faith" set forth in *Leon*, and affirmed the lower court's allowance of the Respondent's Motion to Suppress.

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CONCLUSION

Considering the intentional and flagrant conduct of the executing officers, and weighing all of the circumstances, the Petitioner is incorrect in alleging that the First Circuit misread *Leon* in deciding the present case. Where, as here, the FBI agents did not take every step that could reasonably be expected of them in drafting the warrants, as required by *Massachusetts v. Sheppard,* and where the flagrant misconduct of the agents in executing the warrants cannot reasonably be construed as acting in good faith, it is respectfully submitted that the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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